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(2017) A/Effective Adjudications: Queer Refugees and the Law. Journal of
Intercultural Studies, 38 (4). pp. 453-468. ISSN 0725-6868

Downloaded from: <https://e-space.mmu.ac.uk/628637/>

Version: Accepted Version

Publisher: Informa UK Limited

DOI: <https://doi.org/10.1080/07256868.2017.1341394>

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A/Effective Adjudications: Queer Refugees and the Law

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ABSTRACT

Who is the 'queer refugee'? How do we manage their feelings, emotions and experiences when assessing or supporting their claims for asylum? In contemporary refugee decision-making and litigation, numerous challenges arise when discerning what constitutes a 'well-founded fear' of persecution for a clearly defined 'particular social group'. Specifically, fact-finding and credibility assessment in this area of law reinforces stereotypical assumptions about sexual citizenship, public persecution, fixed identity and immutable erotic desire. An inherent (functioning) sexuality or an essentialist gender identity must be causally related to serious incidents of state sanctioned harm. In doing so, the refugee status-determination process privileges the emotional attachments of decision-makers while occluding the emotional narratives and identities of lesbian, gay, bisexual, transgender, intersex and queer asylum seekers. Responding to these legal and administrative tensions, using case studies from Australia and contrasting them with developments in Europe, this paper uses emotion as a focal point to think about how adjudicators can accommodate disparate cultural differences and experiences in refugee law.

KEYWORDS

LGBTI; queer; refugees; queer refugees; asylum seekers; refugee adjudication; emotion; affect; law; sexual citizenship; gender identity; cultural difference

What does it mean to be recognised as a 'queer' refugee in Australia? How do adjudicators engage with their identities, emotions and experiences when determining their claims for asylum? In Australian refugee adjudication, numerous challenges arise when discerning what constitutes a 'well-founded fear' of persecution for a clearly defined sexual orientation or gender identity-based 'particular social group'. Specifically, the fact-finding and credibility assessment process in this area of law and policy is troubling where it reinforces stereotypical assumptions about sexual citizenship, public persecution, gender expressions and sexual practices while obscuring queer experiences or narratives which do not conform to such stereotypes. In doing so, the refugee status-determination process reveals the attachments, emotions and expectations of adjudicators while covering over the unique narratives of lesbian, gay, bisexual, transgender, and intersex (LGBTI¹) asylum seekers. While scholars have written extensively on the doctrinal development of LGBTI refugee claims and the challenges of decision-making in this area, little has been said about the emotional register in which these claims are made. Specifically, this paper uses a selection of asylum decisions as texts to pick up on the emotional dimensions

of refugee adjudication. I use Australian decisions alongside some recent jurisprudence from the European Union to expose the ways emotions both enable and stifle the recognition of queer asylum claims. In this paper, I draw on cultural philosopher Sara Ahmed's work on the cultural politics of emotion alongside barrister S Chelvan's 'Difference, Stigma, Shame, Harm' model to invite adjudicators (alongside academics and advocates) to critically engage with emotion and experience and how it structures queer injury, intimacy and identity in refugee adjudication. Emotion is not simply a personal matter confined to the bodies of queer asylum seekers; it also manifests in the asylum adjudication process itself. My paper cannot hope to do justice to the rich diversity of queer asylum claims, particularly for trans and intersex claimants who remain at the margins of the existing case law. By combining queer and critical legal scholarship with a selection of refugee decisions, however, I look at the performative nature of emotion to consider how we can improve decision-making in this complex area of asylum law and policy while affirming the disparate emotional experiences of queer individuals who come before the law seeking protection from persecution.

Queering Refugee Law and Emotional Decision-Making

LGBTI people are subject to discrimination, violence and harassment in all parts of the world. Whether in the developing or developed world, homophobia and transphobia remain pernicious and pervasive problems. In a legislative context, 76 countries criminalise consensual same-sex sexual activity and 13 countries have capital punishment for such 'offences' (ILGA 2016: 36–37). Despite such widespread criminalisation and policing, recognising the human rights of LGBT(I) people in international legal and policy fora is an emerging phenomenon. In 2007, the *Yogyakarta Principles* was launched by the International Commission of Jurists to promote international human rights obligations in relation to sexual orientation and gender identity. These international principles act as persuasive interpretations of binding human rights treaties and relate to gay, lesbian and transgender people (though intersex is a notable omission from the document). In the context of granting asylum, Article 23(A) of the *Yogyakarta Principles* identifies an obligation on States to:

Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum. (ICJ 2007: 27)

Under Article 1A(2) of the *Convention Relating to the Status of Refugees* (*Refugee Convention* 1951), there are no specific protected categories of persecution on the basis of sexual orientation or gender identity. In order to seek asylum, persons must be outside their country of origin, and must face a 'well-founded fear of persecution' owing to their ethnicity, nationality, religion, particular social group or political opinion.

Australia has recognised 'homosexuality' as a valid refugee claim since 1992.² In an oft-cited administrative decision, sexual orientation and gender identity claims have been largely defined through the 'particular social group' category arising under the *Refugee Convention* 1951:

When certain societies [...] choose to identify the group by the immutable characteristic of 'homosexual'. (N93/00846 1994)

The explicit recognition of sexual orientation as a basis for asylum claims is promising. Yet, the process of fact-finding in relation to sexual identity and injury remains a troubling element of refugee adjudication. This has generated an enormous body of critical legal scholarship aimed at addressing these fact-finding challenges, especially in relation to providing normative criteria for adjudicators to define the precise nature of identity and persecution (Millbank 2003, 2009; LaViolette 2010; Johnson 2011; Hathaway and Pobjoy 2012; Middelkoop 2013; Luibheid 2014). It is beyond the scope of this paper to detail these contributions in any great length. Jenni Millbank's work, however, is worth noting, as she has been a leading voice in this field, interrogating the conceptual challenges that manifest from administrative decision-making through to judicial review. Millbank has mapped out two key problems facing queer refugees when seeking protection: the notion of a 'well-founded fear of persecution' is highly gendered and subscribing to stereotypes remains a key basis on which (homo)sexuality is authenticated for the purposes of being considered part of a 'particular social group' (1995, 2002, 2003, 2009, 2012). Catherine Dauvergne and Millbank argue that much of the initial jurisprudence in this area focused upon sexuality by understanding the 'social' in the particular social group category as a shared characteristic, innate to individuals (2003: 3). What this obscures, however, is the way the queer body is discursively mediated within the legal system (Golder 2004: 2). That is, queer identities are not fixed, immutable or universal. The challenge becomes conceptualising queer minority refugees in a way that does not occlude their complex identities, intimacies and injuries. Prior to the grant of asylum, refugees must satisfy a bureaucrat that they have a genuine protection claim. Given the inquisitorial emphasis of this process in Australia, asylum seekers who fail to respond (or even understand) questions posed by adjudicators often attract adverse inferences of credibility. Adjudicators disbelieve claims because they misunderstand queer lives. Judicial review operates as a limited safeguard to correct legal errors but assessing the veracity of an asylum claim is generally regarded as a matter dealt with administrators who hear the evidence while judges review errors on the face of the record (Millbank 2009: 3–6).

Sexual orientation and gender identity are not reducible to an oblique script of genital penetration, sexual object choice, bodily features, mannerisms, dress, or incidence of partners. Even international legal documents like the *Yogyakarta Principles* emphasise the emotional and intimate elements of sexual orientation that need not correspond to a particular act or identity (ICJ 2007: 6). Irrespective of this, however, administrative bodies, such as the former Refugee Review Tribunal (RRT), often rely on Western stereotypes about what constitutes 'proper' sex or 'legitimate' desire to recognise queer refugees from different national contexts. The inquisitorial nature of the bureaucracy combined with a lack of strict rules of evidence and limited training for adjudicators result in a number of problematic decisions. No specific sexual orientation, gender identity and inter-sex guidelines have yet been developed by the Department of Immigration and Border Protection (DIBP) to assist caseworkers and adjudicators working in this area. More significantly, while fear is a core component of the legal test to determine if a person will be granted asylum, little adjudicative attention has been paid to the way this is registered in law. Recognising these limitations urges us to pursue more dialogic and creative lines of inquiry that allow us to register the relationship between queerness and emotion in the context of LGBTI refugee claims.

In this paper, I want to advance a more creative line of inquiry by considering the emotional and intimate dimensions of not only refugee experiences but also of refugee decisions themselves. To do this, I draw on Sara Ahmed's conceptualisation of emotion as a performative enactment to rethink the ways in which decision-makers engage with a queer asylum seeker's fear of persecution. In *The Cultural Politics of Emotion*, Ahmed writes that emotions are not simply embodied states; they are contact zones of movement and attachment (2004: 11). Fear, for example, projects us into an experience of the future by revealing our proximity to imminent acts or attachments (such as terrorism or terrorists) that can hurt or injure us (Ahmed 2004: 62–65). Ahmed notes that whilst we are moved by emotion, it also operates to ground the body to a particular space, sign, or object. Rather than seek to ask what emotion is, Ahmed invites us to consider what emotion does to us. In this paper, I follow emotion through doctrines, facts and norms that shape the adjudication of LGBTI asylum claims. Attending to case law in terms of their emotional enactments helps to expose the biases and (hetero)normative limits to the recognition of queer refugees.

Queerness, as it relates to subjectivity, is not ultimately confined to a discrete identity or identification, but rather reveals our non-normative sexual, gendered and cultural differences (Valdes 2009: 107). These dynamic forms of identity and identification emerge in emotional and embodied ways; a process of orientation that must be understood in specific cultural and historical contexts (Ahmed 2006: 54). In this paper, I use queer as a critical term that refers to practices, pleasures, emotions and identities that 'disorient' decision-makers by failing to conform to their normative ideas of sexuality, nationhood and family (Bell and Binnie 2000: 13–15). These elusive, non-normative movements make the adjudication of queer refugee claims challenging. The following sections set out these conceptual challenges in more detail and outline ways to address them.

Navigating Culture, Experience and Identity

Constructions of sexual and gender identity as a 'particular social group' in international refugee jurisprudence remain elusive and unpredictable. Specifically, asylum seekers in this area are in a precarious position given the divergence between social perception, social visibility and immutability tests that underscore legal characterisations of a 'particular social group' in national jurisdictions (Bresnahan 2011: 651). Within the current scope of asylum jurisprudence, recognising the 'queerness' of refugees who face a well-founded fear of persecution relies on causally relating narratives of possessing an 'authentic' sexuality or the pathology of a 'wrong body' to specific incidents of state-related persecution. While there are no published cases on intersex claims in Australia, intersex advocacy organisation OII Australia notes that intersex people face persecution in several countries through risk of infanticide, coercive surgical procedures, destitution and a lack of legal or familial recognition because of their physical sex differences (OII Australia 2011).

A critical problem for refugee adjudicators is negotiating the cultural differences and the emotional experiences of those who seek asylum. In 2012, the United Nations High Commissioner for Refugees (UNHCR) updated its sexual orientation and gender identity protection guidelines to address the need for culturally sensitive decision-making that disavows stereotypes (UNHCR 2012: 15–16). Psychologist Sharalyn Jordan argues that the demand for LGBT (intersex is not specifically featured in her discussion) refugees to

‘come out’ forces the narratives of claimants to meet ethnocentric and masculine expectations of sexual visibility (2008: 173). Legal scholar Toni Johnson elaborates that adjudicators often fail to grasp the emotional ‘tells’ of oral testimony because they refuse to imagine experiences of sexual or gender identification that contests their pervasive assumptions of what being ‘gay’ looks/sounds like (2008: 70). Instead of understanding the reasons for silence, adjudicators use it as a marker to impugn an asylum seeker’s credibility. Psychologists Ariel Shidlo and Joanne Ahola suggest that the asylum process relies on the asylum seeker lodging a prompt claim while disclosing a clear and coherent narrative. Reflecting on their clinical work, they argue these demands ignore the impact of post-traumatic stress disorder, internalised shame or secrecy and depression faced many applicants. Indeed, recounting a history of persecution is a retraumatising act (Shidlo and Ahola 2013: 9).

In a gendered sense, female applicants often find that their own stories are often substituted by the culturally insensitive imaginations of adjudicators. In one case, a female applicant from Mongolia sought asylum on the basis of her sexuality and discussed her experience of domestic violence and the public derision she endured because of her transgressive romantic attachments. The RRT, however, responded to her claim quite dismissively:

I accept that the applicant has a girlfriend and that she has had a close relationship with this friend since [year]. I have doubts as to whether their relationship is a lesbian relationship as the evidence as to how they first met and their lack of involvement in the lesbian community is of concern. Further the applicant gave little details of the nature of the relationship and I felt she was being evasive as to the real basis of their friendship. (0802825 2008)

Furthermore,

... [D]espite claiming she was a lesbian that [sic] she had no other contacts with lesbian groups or other lesbians after her initial contact with her partner in [year]. (0802825 2008)

While the applicant in this case was deemed to be a refugee, the association between her claim to a lesbian identity and her lack of involvement in a purported public ‘lesbian community’ was seen to limit her credibility. As the applicant did not choose to disclose her sexual orientation or travel with her partner, the RRT defined her intimacy as platonic rather than sexual in character. As legal scholar Nicole LaViolette observes, the emphasis on penetrative sexual activity to define sexuality occludes the lives of queer women who generate intimacies that do not conform to patriarchal heterosexuality (2010: 182). Moreover, being unable to verbally communicate with her partner who spoke a different language undermined the applicant’s credibility, as speech was seen by the RRT as foundational to romantic intimacy. The ‘real basis’ of the purported relationship was understood to be strictly a platonic friendship. Apparently, the applicant had ‘misconstrued’ it as a homoerotic one. Effectively the applicant’s experience of her sexuality was replaced by another assumption of what homosexuality ought to look like. Additionally, it is significant to note that her sexual identity was intersected by other social differences: the applicant in this case was not simply persecuted for being same-sex attracted, but was also subjected to domestic violence. She lacked financial independence and remained discreet about her sexual orientation. The inability of the decision-maker to recognise her unique

emotional and cultural position denied any credibility to the romantic experiences she shared in her testimony.

Bisexuality adds a further critical challenge by countenancing the fluidity of sexual desire. As legal academic Sean Rehaag notes, bisexual refugees face erasure within an adjudicative space that defines sexuality in a homo/heterosexual binary (2009: 423–425). In *N98/23086* (1998), for example, the applicant's same-sex attraction was dismissed as 'experimentation'. Instead of accepting his claim to being attracted to men, his sexual identification was eclipsed by a decision-maker who believed he had not attempted to engage in enough heterosexual relations before being able to 'qualify' as 'really' gay. Moreover, in *V97/06483* (1998), the applicant was rejected as being same-sex attracted because he had engaged in cross-sex activities and was therefore capable of 'functioning as a heterosexual'. Taken together, bisexuals are either disbelieved or, if they are believed, their capacity for heterosexual relationships is seen to mitigate their need for protection.

RRT decisions concerning transgender or gender non-conforming asylum seekers exemplify some of the anxieties evident in sexual orientation claims when it comes to defining the experiences of the 'particular social group'. In law, a particular challenge for adjudicators has been distinguishing the nuances of gender identity or expression from the nature of sexual orientation (Sharpe 2002; Spade 2011). As LaViolette notes, legal perceptions that gender expression is 'voluntary' (as distinct from immutable) have been difficult to contest (2010: 183). In one case, an applicant from Thailand identified as both homosexual and a transvestite, and claimed to be unable to 'practice being gay openly in the workplace' and for also being unable to 'dress as a girl to go to work' (*N03/46498* 2003). I do not claim that adjudicators should have approached this case as one involving a trans subject. After all, those who cross-dress often identify with the sex they were assigned at birth and do not necessarily identify as trans (Valentine 2007: 32). However, while the applicant's gender identification as a 'transvestite' was acknowledged by the RRT, no attempt was made to distinguish it from sexuality. Indeed, the claim was reduced to whether the applicant was a 'practising homosexual'.

A promising recent example, however, evinces a more nuanced approach to adjudications relating to non-conforming gender expressions. The case concerned a transgender applicant from South Korea who identified 'predominately as male ... [with] a lot of female characteristics' (*0805932* 2008). In elaborating on the 'blend' between their specific sexual and gender qualities, the applicant also noted that South Korea confused being homosexual and transgender. In response, the RRT defined the relevant particular social group as 'male homosexuals with transgender characteristics'. Rather than conflate sexual orientation with gender identity, the RRT were clear to distinguish the 'imputed transgender' characteristics from 'homosexuality' by referencing Australia's Department of Foreign Affairs and Trade country information advice. While acknowledging possible connections, sexual orientation and gender identity were differentiated in the decision.

In a more recent case, Australia granted protection to an asylum seeker who identified as a (heterosexual) post-operative transgender female from Malaysia on the basis of their gender identity (*0903346* 2010). Here, the RRT accepted that the applicant belonged to the class of a 'Malaysian transgender woman without familial or financial support or protection' (*0903346* 2010). While the RRT affirmed the claim, the enormously narrow particular social group in this case militated against the decision-maker accepting 'transgender' as a social group in its own right. The RRT was concerned that such a category would be too

broad. In narrowing the particular social group, the RRT considered evidence which showed that individuals who identified within such a social group lacked employment options, frequently engage in sex work, and use drugs. No financial or familial support was available to the asylum seeker either. Elaborating on the culturally specific context of the claim, the RRT made reference to the fact that male-to-female transsexuals or 'mak nyah' or 'aravanis' are subject to an Islamic 'fatwa', and must be subject to policing (0903346 2010). While we can commend the culturally nuanced approach to adjudicating a trans refugee claim from Malaysia, the highly specific particular social group formulation in this case seemed to be determined, at least indirectly, through numerous references to persecution (such as a lack of familial or financial support or protection). In other words, anxieties over making the particular social group category 'too broad' deny protection to trans asylum seekers who are unable to demonstrate their belonging to a highly narrow category of social experience.

Managing Visibility

During 2011, a claim made amidst international concern about the Ugandan Anti-Homosexuality Bill 2009, a female asylum seeker from Uganda had her sexual orientation impugned because her relationship with another woman did not conform to the expectation that lesbian sexuality should be easily visible. She claimed:

I have kept my homosexuality private in Uganda because I fear for my life. It is for this reason that I did not directly associate with or join lesbian groups. (V1102095 2011)

Refusing to accept this testimony at the initial interview, the departmental delegate claimed she 'had merely adopted the persona of a homosexual' for a protection visa. By judging her claims against some abstracted lifestyle, being gay became synonymous with consumerism or promiscuity. On review, while her claims were accepted, the administrative decision-maker did not consider how the bureaucratic stereotype of an amorphous 'homosexual persona' denied the ways queer asylum seekers negotiated their intimate lives in specific cultural contexts. Due to a lack of cultural curiosity (or even desire to seek country information) on the part of the primary decision-maker, her claim was initially rejected.

Ethnocentric indexes used by adjudicators to visibly render a person's sexuality produce a 'double bind' for queer asylum seekers to negotiate. Hesitancy in oral testimony often undermines the credibility of the narrative, whilst well-scripted recountings of experience are disbelieved for the lack of emotional response. Either the individual fails to provide a 'coherent and plausible' narrative because of shame or trauma, or they respond in an unemotional manner, which makes the accounts of sexual persecution unbelievable (Millbank 2009: 17). In particular, prior to being ruled unlawful by the High Court in 2003, the evidentiary difficulties of proving one's sexual orientation were supplemented by a 'discretion' test which required applicants who had 'chosen' to keep their sexuality secret back home to continue to do so in order to mitigate the risk of persecution (*S/395 2002 and S/396 2002 v MIMIA* 2003). Despite this landmark ruling, adjudicators are still able to discount any activity undertaken in Australia that is deemed to be self-serving in bolstering the protection claim. In 2014, reforms to migration law have further restricted the scope of progressive asylum jurisprudence: adjudicators may deny protection by deeming an

asylum seeker's expressive activity or behaviour as something that could 'reasonably' be modified to avoid the threat of persecution, unless that characteristic is inherent to their persecuted identity (*Migration Act 1958* 5J).

Culturally different experiences of sexuality and gender diversity must be translated across different emotional, as well as linguistic, positions (between the adjudicator and the applicant). If emotion marks the point at which an asylum seeker is rendered credible or not, refugee adjudicators must critically engage with the experience of emotion, in order to avoid erasing the marginal voice of the queer refugee when seeking to understand the nature of persecution itself. Barrister S Chelvan argues that a way of framing queer experiences is using the Difference, Stigma, Shame and Harm (DSSH) model. Instead of seeking a chronological or linear account of sexual or gender identity, Chelvan suggests we should focus on when the applicant identified as different, how this difference was stigmatised by others, how the stigma generated (self) shame and the extent to which the shame and stigma resulted in harm (Chelvan 2013: 28). Understanding what counts as 'serious harm' involves intensely emotional experiences that are not easily imparted to adjudicators. The previously discussed case concerning a lesbian applicant from Mongolia exposed how 'coming out' within a marital context of domestic violence can be particularly fraught:

She told me that on [date] her husband came to her home and raped and beat her ... She fears that he will repeat his assault if she returns and this is what made her decide to leave Mongolia ... She also feared that if it became known that she was a lesbian that her child would be taken away from her and no one would look after the applicant's interests. (V1102095 2011)

This discussion of persecution troubled the public/private divide in the law. For women, who were positioned within the domestic sphere as victims of violence, the matter may be deemed to be a 'family issue' and not a matter for state intervention. Sexual practices (or being marked as a lesbian) in the context of this case carried the threat of displacing motherhood: the applicant risked losing her child. Economic pressure and physical violence also coerced the applicant into managing her sexual visibility, enduring her marital harassment to avoid being marked as a lesbian in a public context. The applicant's fears were an anchoring point for how she managed her queer visibility. She refused to be public about her abuse to the police because she feared it would result in further discrimination. The marital home became a material rather than a metaphorical closet by policing her same-sex desire. Her queer desires, if rendered public, would then threaten her legal status as a capable mother. This case evinces the need for refugee adjudicators to critically reflect on their own cultural or emotional location, just as much as the asylum seekers themselves, when 'hearing' refugee narratives.

Applying critical legal theory approaches to refugee adjudication complicate the parochial legal constructions of identity and persecution. For Millbank, the refugee is delineated 'through gendered notions of the public and private' (2003: 72). She suggests that decision-makers conflate peripheral sexuality with 'ruptures' in the public order (Millbank 2003: 87). Much of Millbank's analysis considers the paradoxical notion of 'visibility' and 'privacy' by undermining the problematic assumptions of lesbian refugee bodies. These bodies are cast as either exhibiting overt displays of sexual activity or subject to erasure within a patriarchal logic that narrates sexual activity solely in terms of phallic penetration (Millbank 2003: 82–83). Millbank elaborates that there needs to be significant

shifts for administrative decision-making 'to articulate an expression of public sexuality in a human rights framework' or 'sexual self-determination' (Millbank 2003: 92). Expanding on this human rights-based argument, I want to articulate the value of engaging with emotion and experience as a way to critique the rigidity of refugee adjudication processes that seek to determine what counts in authenticating a sexual or gender identity.

Representing Emotion and Persecution

Emotion poses significant challenges to legal representation. Echoing feminist legal theorist Robin West, providing a space for marginalised people to relate their emotional stories is a crucial component for doing justice to the excluded subject in the law (1988: 141–143). By noting that identity is produced in an emotional context, there is greater possibility for thinking about how diasporic desire, sexuality and violence can be experienced in different spaces. In the following case, the applicant from Lebanon recounted his desire to lead an 'open gay lifestyle'; however, this was met with some social difficulties:

As to whether he had been anywhere in Australia where homosexual men, whether Arabic-speakers or not, socialised, he said that he had gone 2–3 times to Place E but nowhere else. He said he was not used to the atmosphere there. (1000152 2010)

Moreover, the applicant noted:

As to whether he had had any contact with homosexual men in Australia, he said he had not met anybody. He added that 'I don't like the system here - the way they dress'. (1000152 2010)

In this case, the asylum seeker provided an easily discernible account of his desire to live free from persecution. However, it did not necessarily follow that living as an 'out' (and purportedly visible) gay man came without problems in the asylum country. Despite his regular attendance at a particular social venue, as he was 'not used to the atmosphere', his social and erotic agency was limited. By abstractly referencing the Australian 'gay scene' in terms of a peculiar way of dressing, the asylum seeker articulated his emotional discomfort. His desire to live an 'open' life was underscored by his lack of sexual desire for other homosexual men and his inability to engage in the available social 'atmosphere' in Australia (Raj 2011: 178). Recognising the asylum seeker's shifting sexual attachments requires adjudicators to appreciate the emotional pressure of sexual identification.

Exploring the relationship between sexual identifications and violence requires a focus on both emotion and space. Persecution is an embodied experience that cannot be reduced to singular modes of being or identity (Mason 2002: 59). Fear of violence becomes embedded in a sense of belonging to a space and how one understands that feeling. In the case of the Lebanese asylum seeker who chose to not engage in sexual activity with other men, the RRT queried the kind of fear his body risked if he was returned home:

As to what he had feared would happen to him in Lebanon if it was [sic] known he was homosexual, he said that he had mental pressure. Also if his family knew they would have a big problem. It was a strict family. Socially he would be an outcast. (1000152 2010)

Injury, in this testimony, was articulated as the constant threat of violence if he made his desire visible: 'if his family knew they would have a big problem'. In order to be granted refugee status, a history of physical violence need not exist. In this case, the fear of being an

‘outcast’ and prospective persecution was articulated through familial imaginaries (Mason 2002: 60). Space became crucial to the articulation of his experience of persecution: injury was a risk in the domestic space (including literal and symbolic isolation from the home). Understanding injury through the applicant’s emotional sense of (non)belonging – the threat of being repudiated from his familial space – enables us to see how his fear produced a ‘mental pressure’ to conceal his sexual orientation. Even when an asylum seeker’s sexual or gender identity is recognised, their claim for harm can be dismissed for not amounting to a well-founded fear of persecution. Like this applicant from Lebanon, queer asylum seekers can find it difficult to establish a causal link to the absence of state protection when much of the violence they emotionally endure occurs at home – perpetrated by their family or community.

Emotional responses to violence emerge in the negotiation of shared spaces. In discussing the emotional dynamics of fear, Ahmed argues that fear does not reside internally within a particular body. Rather, it is a visceral exchange between competing gazes (Ahmed 2006: 62–63). Fear projects us into an experience of the future, an imagining or feeling of anticipated hurt or injury (Mason 2002: 64). As a female applicant from Vietnam recounted (071862642), fear was the anticipation of physical and verbal assaults:

For a long time I didn’t have any relationship mainly due to the fact that I was afraid to go through the same things all over again. In spring [year deleted] I met [name deleted] and we started seeing each other as a couple. Our situation was not better than before, meaning, we had to pretend to be just friends (071862642, 2008).

In this testimony, the connection with being ‘afraid’ and the previous history of abuse is clear: ‘I was afraid to go through all the same things all over again’. Fear limited queer social (and sexual) intimacies by projecting an imagined set of taunts or injuries that could happen ‘all over again’. Even when the asylum seeker engaged in a relationship with another woman, the constant threat or fear of violence determined how that queer intimacy was rendered visible. Fear motivated them to ‘pretend to be just friends’. In this case, the performance of friendship became thus both a psychological and physical necessity to manage the fear of persecution.

Troubling Progress

In recent years, there has been celebrated case law seeking to better recognise emotional experiences of persecution and curb the way in which stereotypes infiltrate refugee adjudication. The European Court of Justice (ECJ), for example, has circumscribed the intrusive questions, sexual stereotypes and types of evidence that can be used to determine asylum claims. Yet, such progressive international refugee jurisprudence has enacted some of the fears that underpin the fraught adjudication processes I have discussed so far in the Australian cases. In *Joined Cases of A, B and C* (2014), three asylum seekers in the Netherlands were denied protection on the basis that they had not been credible (*Joined Cases C-148/13 to C-150/13*, 2014). In all three cases, the applicants were either willing to submit, or had already submitted, pornographic evidence to prove the veracity of their sexual orientation. Each claim had initially been refused by the Netherlands on the basis that the narratives were ‘vague, perfunctory, and implausible’ (*Joined Cases C-148/13 to C-150/13* 2014: 22–29). In response to these claims, the ECJ overruled any residual use

of sexually demeaning questions and pornographic evidence for demonstrating the veracity of a person's sexual orientation. Yet, the decision still permitted the use of some stereotypes to assess the credibility of an asylum seeker's self-identification about their sexuality.

According to an advisory opinion authored by Advocate General Sharpston prior to the Court's final ruling, an assessment of sexual orientation began with self-identification and this should be assessed in specific rather than general terms. After all, 'an averred sexual orientation cannot be objectively verified' (*Joined Cases C-148/13 to C-150/13*, 2014, [43]). In condemning current methods of sexual verification, AG Sharpston observed that medical exams, pornographic evidence, sexual stereotypes and prurient questioning were inconsistent with the protection of privacy and dignity in the European Charter. They were 'blacklisted' (*Joined Cases C-148/13 to C-150/13* 2014: 54). However, a number of methods of verification that existed on a 'grey list' were permissible in credibility assessment: including a failure to disclose sexual orientation at the earliest opportunity and a lack of 'general knowledge' about LGBTI organisations in the applicant's home country (*Joined Cases C-148/13 to C-150/13* 2014: 54). Verification took on a public rather than private dimension. Instead of appeal to sexual discretion, the Court focused on the need for an applicant to be public about their sexuality. Reference to this 'grey list' also evinced that much like an analysis of persecution, credibility assessment and visibility were intimately connected. In this case, sexual identity was a collectivised experience: being able to identify LGBTI public groups and disclose queerness publicly were markers of credibility.

Even when moving away from stereotypes or invasive sexual questioning, AG Sharpston reiterated the need to authenticate the veracity of a person's sexual orientation. She not only condemned medical testing as problematic because homosexuality was not a disease but also because sexual testing (like determining whether or not a person was physiologically aroused by gay pornography) failed to distinguish 'genuine applicants from bogus ones' (*Joined Cases C-148/13 to C-150/13* 2014: 62). Moreover, questions that relied on stereotypes were dangerous because 'bogus applicants' may have 'schooled themselves in preparing their application' (*Joined Cases C-148/13 to C-150/13* 2014: 65). As Didier Fassin argues, the 'refugee question' has been tightly circumscribed in recent years by normative ideas of 'truth' (whether an asylum claim fits within the legal framework) and 'true' (the veracity of asylum experiences). What was once an issue of 'humanitarian compassion' has now become a matter of 'anxious control' (Fassin 2013: 41). By tracing a broad historical shift in the process of recognition, Fassin also reveals a shift in a register of emotion: seeking asylum is not a right born from the recognition that everyone is entitled to seek asylum, but rather a matter of state discretion (or a 'gift') conferred once claims have been thoroughly scrutinised (2013: 55). Fassin's argument helps identify the politics of anxiety that underpins adjudicating asylum claims: experiences must be interrogated to avoid 'bogus' claims succeeding. The hypermobility of bogus refugees is met with a need to contain them (Ahmed 2004: 73). While scholars have critiqued the socio-legal construction of the 'bogus' refugee, the affective ways in which this claim appears in the law itself has yet to be fully considered (Johnson 2011; Fassin 2013; and Millbank 2009). In *Joined Cases of A, B and C*, sincerity was an issue for adjudicators to probe but the current methods of credibility assessment militated against that. In fact, the anticipation of bogus claims worked – as a threat to the integrity of asylum processing – to rethink methods of verification. Fear worked to reveal the proximity to threat: bogus

claims were brought into circulation by stereotypes and assumptions that could be performed by anyone. AG Sharpston's advisory opinion revealed how fears of erroneous adjudication as a result of such misdirected interrogations pushed away some stereotypes while reproducing the need to heighten scrutiny of asylum claims in other ways. Fear and anxiety circumscribed the fact-finding dimensions of refugee adjudication.

In reiterating the need for credibility assessment to respect dignity and privacy, the ECJ ruling strengthened the need for assessment to ensure the veracity of queer claims. Self-identification was important but it was not determinative of an applicant's sexual orientation (*Joined Cases C-148/13 to C-150/13* 2014: 52). The Court also returned to the use of stereotypes in a partial sense: they may be a 'useful element' in adjudication but they could not be the sole basis on which an asylum claim was determined (at the exclusion of personal circumstances) (*Joined Cases C-148/13 to C-150/13* 2014: 62). The ECJ, however, repudiated the use of detailed questions about sexual experience, as it was contrary to respect for private life. In doing so, the Court suggested that even if applicants were willing to provide oral or visual evidence of their sexual activity, such evidence was to be refused on the basis that it had very limited probative value (*Joined Cases C-148/13 to C-150/13* 2014: 65). Dignity and privacy were invoked in this decision as both covers and containers – ones to shield sexual minority refugees from humiliating questions by containing the kinds of questions that may be asked of them. Unlike the cases discussed above, the containment here worked to shield queers from being forced to endure bureaucratic experiments to assess sexual orientation. The container worked to limit questions that affront personal dignity rather than to protect the (persecutory) administrative sensibilities that may be affronted by visible queerness.

Yet, these progressive gestures of containment also evinced fear: encouraging stereotypes opened up the asylum process to abuse by 'bogus' claimants who threatened the integrity of adjudication. *Joined Cases of A, B and C* loosened the understanding of intimacy and expression to recognise the vulnerable position of queers in the status-determination process (*Joined Cases C-148/13 to C-150/13* 2014: 70). Yet, identifying the performative dimensions of sexuality worked to expose the vulnerability of the adjudication process itself. Disingenuous applicants could 'game' the system by rehearsing the stereotypes used to measure sexual identity and intimacy. As a consequence, the Court found that a shift from demeaning sexual questions to ones that enabled personal narrative would strengthen the quality of decision-making (*Joined Cases C-148/13 to C-150/13* 2014: 60–61). Adjudicators need not only reflect on the threats facing refugees if returned home but they must also turn their attention to the threats of those 'bogus' claimants. In the jurisprudence, the act of eschewing prurient sexual questions and pornographic evidence became a means of protecting the adjudication process – containing the threat of insincerity. The demand for authenticity was reproduced rather than repudiated and the Court was able to pull away from the fact that all sexualities were performative.

Fear in the *Joined Cases of A, B and C* invites us to consider that instead of policing queer asylum narratives, decision-makers should open them up and consider the consequences of emotion or fearful disclosure. Both the decision and existing critical legal scholarship outlined above have emphasised that questions should focus much less on sexual activity or testimony about 'discovering' one's identity and more on uncovering personal experiences of being 'different' (which do not necessarily follow a linear trajectory). Asylum seekers should be asked about what makes them different, when they realised that difference was

considered socially as ‘wrong’, how they came to experience shame because of that realisation, and finally what harms they may have also experienced because of it (Chelvan 2013: 28). Moreover, silence must also be accommodated in the interpretation of queer asylum narratives. While the ECJ did not consider the issue of silence and difference in enormous depth, the case did open up new ways of thinking about belonging to a particular social group and experiencing persecution. Evasion of questions about homophobic violence or refusals to speak about a particular sexual activity became points for dismissing the idea these claims were disingenuous. However, the case did not open up queer emotional experiences of marginalisation: the depths of sexual shame or stigma were confined. Fear worked in this case to contain the scope of sexual minority asylum – both in terms of the applicants’ claims for protection and the adjudication of those claims, even while it limited the humiliating questions or evidence that could be demanded of queer asylum seekers.

Conclusion

Queer asylum claims continue to challenge assumptions about identity, persecution, credibility and experience that underscore international refugee law and its administration in national contexts. The purpose of this paper has been to use emotion as a conceptual register to tease out some inconsistencies and paradoxes that limit status-determination processes at a legal and administrative level in Australia. In doing so, my paper has not been one that fully probes the alignment of international refugee law with its Australian counterpart nor has it detailed the bureaucratic dimensions of refugee adjudication more broadly. Moreover, I want to emphasise that the diversity of queer experiences, particularly relating trans and intersex people have not been fully addressed. Instead, I have used cases as texts, including more recent progressive interventions from the EU, to expose how and why adjudicators struggle to adopt an analysis that engages with queer experiences of injury, intimacy and identity. Queer refugee experiences of navigating the asylum system are emotionally dynamic and have the capacity to (re)shape identities and how individuals identify with a particular sexual orientation or gender identity. They also have the capacity to redefine the normative boundaries of refugee law.

In order for adjudicators to better engage with queer refugees, they must be willing to interrogate their own emotional and conceptual attachments to narrow ideas of sex, sexuality, gender identity and persecution. This largely involves eschewing stereotypes in favour of attending to the emotional dynamics of queer experiences in adjudication. While I am wary of prescribing the exact forms such ‘attending’ should take, the queer affective critiques advanced in this paper should set the scene for adjudicators looking to develop more reflexive recognition and robust protection of queers fleeing persecution. In this paper, I have argued that by queering emotion, thinking of it as an adjudicative enactment that arises when norms and narratives come into contact, we can expand the adjudicative space for protecting queer refugees.

Notes

1. The term ‘LGBTIQ’, ‘LGBTI’ and ‘LGBT’ have been used differentially in this paper, depending on the relevant case or material discussed. These terms are culturally variable and contested. There have been also no published decisions relating to intersex asylum claims and

relatively few gender identity claims in Australia. These specific claims require further research and critical interrogation.

2. I use the term 'homosexual' where it has been explicitly used in the decision. This term has a medicalised history that is beyond the scope of this paper to address (see, for example, Foucault 1978).

Disclosure statement

No potential conflict of interest was reported by the author.

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